Supreme Court, U.S.
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NO

IN THE

Supreme Court of the United States

RUSSELL E. LERMAN, on behalf of himself and all others similarly situated

Petitioner,

v.

ALBERT ARI, Acting Director, State of New Jersey, Division. of Motor Vehicles

---

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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65 pp

QUESTIONS PRESENTED

I. Can a District Judge grant a Rule 12b)(6) motion to dismiss a verified complaint based on a bare unsworn assertion in movant's brief that "there is no evidence that the Director of the Division of Motor Vehicles has exceeded the statutory authority provided by the Legislature"?

II. Whether a Rule 12(b)(6) proceeding resulting in the dismissal of Petitioners Complaint in District Court comported with the principles of Due Process?

III. Is it a recusable offense under 28 U.S.C. § 455(a) when the opinions accompanying a District Judge's orders are clearly erroneous and who refuses to consider a motion to vacate them by arbitrarily invoking the "law of the case" doctrine?

IV. Does a complaint state a claim for which relief can be granted under 42 U.S.C. § 1983 by alleging that a licensing agency abused its state authority in that it had no substantial evidence proving its procedures had been perfected under the Administrative Procedure Act resulting in the illegal and unconstitutional seizure of a liberty and property Interest?

V. Whether the constitutional validity of an administrative agency's procedures that impacts the motoring public should be resolved in the public interest as the issues are bound to recur in the future?

VI. Can a District Judge's dismissal of a 42 U.S.C § 1983 claim under Rule 12(b)(6) be voided because its basis was an opinion that propounded an "administrative rule" which circumvented the state's Administrative Procedure Act?

VII. Can a District Court dismiss a 42 U.S.C. § 1983 complaint under Rule 12(b)(6) purportedly because Due Process was provided that justified the suspension of a driver's license when:

1) A driver did not appear in municipal court after being served a traffic summons by a police officer?

2) A driver did not appear in municipal court pursuant to an administrative agency order?

VIII. Whether the procedures propounded by an administrative agency to suspend a driver's license purportedly pursuant to a state statute violated the driver's constitutional rights under the Fourteenth Amendment's Equal Protection Clause?

IX. Can a District Judge refuse to consider a novel theory that applied Fourth Amendment principles to the seizure of a motor vehicle owner's driver's license, in order to dismiss a complaint for failure to state a claim for which relief can be granted?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Russell E. Lerman respectively prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this matter on March 13, 2002 with a subsequent Petition For Rehearing being denied on April 9, 2002.

OPINIONS BELOW

The opinions below are annexed from APP 46 to APP 58.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

ORDERS

The United States Court of Appeals for the Third Circuit affirmed the dismissal of Russell E. Lerman's class action complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure in the United States District Court for the District of New Jersey on March 13, 2002. A subsequent Petition for Rehearing, annexed from APP 58 to APP 59, was denied on April 9, 2002.

STATUTES AND AMENDMENTS INVOLVED

Amendment IV-Searches and seizures:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizure, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things seized.

Amendment XIV-Rights guaranteed, privileges and immunities of citizenship, due process and equal protection:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983-Civil action for deprivation of rights:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute Of the District of Columbia.

State statutes involved are shown in the appendix on APP 36 to APP 43.

STATEMENT OF THE CASE

1. *Background*

The Petitioner was operating his car on a rural road at 10:35PM in Randolph Township, New Jersey. After passing a tavern he was stopped by patrol officer David Stokoe who violated N.J.S.A. 39:5-25 (APP 39) when he issued a traffic ticket falsely accusing the Petitioner of violating N.J.S.A. 39:4-144.(APP 36) The ticket's trial date only allowed the Petitioner three days to prepare a defense although state law allows five days. The Petitioner never appeared in the Randolph Municipal Court nor was he ever convicted of the said offense. (APP 30,¶ 3)

The rules of criminal procedure attaches to the quasi-criminal proceedings in municipal court so in order to obtain personal jurisdiction either a driver appears voluntarily after receiving a traffic ticket or is arrested and forced into municipal court.

As a result an arrest warrant was issued. The warrant violated the warrant clause of the Fourth Amendment because its basis routinely lacks a sworn complaint nor a certification under penalty of perjury by a patrol officer, and a probable cause determination to issue it by a municipal court official. (APP 30,¶ 4)

Consequently the typical facially defective arrest warrant was never executed in thirty days. (APP 30)

Nevertheless it was instrumental in triggering a convenient computer generated license suspension procedure. (APP 30,¶ 6) This convenient procedure was concocted by the Defendant's administrative agency. (DMV).

The said procedure was fatally flawed because it constituted an "administrative rule" that never was subjected to the scrutiny of the mandatory Due Process procedures contained in the state's Administrative Procedure Act. (APA)(APP 41-3). Thus these procedures were illegal, unenforceable and unconstitutional as alleged in the Petitioner's Complaint. (APP 28, ¶ 2)

Consequently the Petitioner did not obey the DMV order, that was contained in the procedure, to voluntarily appear in municipal court within 59 days.

(APP 35) Therefore the Petitioner's driver's license was typically summarily indefinitely suspended (APP 31,¶ 9) without first being given the right to an administrative pre deprivation hearing. This procedure is analogous to a quasi-in-rem real estate attachment but there was no substantial evidence, i.e. an affidavit or sworn testimony to support the seizure or attachment.

The DMV, an administrative agency, simultaneously usurped power. It made itself part of the state's legislative branch by bypassing the APA to promulgate a penal standard of conduct, and also part of the state's judicial system by routinely enforcing a bogus arrest warrant without probable cause.

2. *District Court Proceedings*

The Petitioner invoked the jurisdiction of the United States District Court, District of New Jersey under 28 U.S.C. § 1343(a)(3)(4) when a civil rights claim under 42 U.S.C. § 1983 was filed on July 18, 2000. (APP 28-36) The Defendant did not file a timely answer which caused the clerk of the Court to enter the default of the Defendant.

Afterwards the Defendant moved the court to vacate the entry of the default without taking leave of court to respond out of time. The only reason given in Defendant's affidavit justifying the motion was that there was "administrative delays". There were no corroborating affidavits that these delays actually happened and who was responsible. Case law in other Circuits stipulate that these instruments have to be served with the motion along with a proposed Answer to the Complaint to determine if there was a meritorious defense. Nevertheless the District Judge erroneously vacated the entry of Default and allowed the Defendant to Answer the complaint. Instead of Answering the Complaint the Defendant moved to dismiss the Complaint under Fed.R.Civ. P 12(b)(6).

The Complaint was summarily dismissed pursuant to Rule 12(b)(6) on issues that were not argued in the Defendant's moving papers. (APP 44-6) This denied the Petitioner his constitutional right to advance notice and right rebut the Court's sua sponte

ex parte argument prior to the judgment. Motions to vacate for the aforesaid reasons were ignored under the "law of the case" doctrine.

3. *Court of Appeals Proceedings*

All the errors in the District Court were argued by the Petitioner in the Court below for reversal but were totally ignored when it trickingly held that these errors should be appealed. (APP 58)

The Court below also ignored the Petitioner's argument for reversal under the law in *Berardi v. Swanson Memorial Lodge No. 48*, 920 F.3d 198, 200 (3rd Cir. 1990) . This case holds that a judge's ruling based on issues not argued by a movant under Rule 12(b)(6) is reversible error.

The per curiam opinion below merely extracted portions verbatim out of the District Judge's opinion. (APP 56-8) Anybody could have written it. It is doubtful that the judicial panel ever ruled on the Petitioner's papers, and that the case was actually expeditiously "stonewalled" by a law clerk in the clerk's office.

REASONS FOR GRANTING THE WRIT

In this case the District Judge's sua sponte ex parte opinion, which was affirmed by the Court of Appeals has accomplished the following:

1. Ignored and bypassed the constitutional procedures imbedded in the state's Administrative Procedure Act.

2. Failed to rule on a novel application of Fourth Amendment principles in regard to the suspension of a motor vehicle's owner's driver's license.

3. Failed to provide the Petitioner a full and fair hearing guaranteed under the Fourteenth Amendment.

4. Ignored a state administrative agency's abuse of its state authority, which is actionable under 42 U.S.C. § 1983.

5. Ignored the Fourteenth Amendment's Equal Protection Clause by claiming the DMV procedures had provided the Petitioner Due Process which was inconsistent with the enabling statute and its construction by the New Jersey Supreme Court.

6. Ignored that issues in this class action suit will not be mooted because they are a continuing wrong as they will assuredly impact motorists in New Jersey.

7. Presented issues involving the construction of the Fourth Amendment, 42 U.S.C. § 1983, 28 U.S.C. § 455(a), Fed.R.Civ.P.8(a)(2) and Fed.R.Civ.P.12(b)(6).

I. Can a District Judge grant a Rule 12b)(6) motion to dismiss a verified complaint based on a bare unsworn assertion in movant's brief that "there is no evidence that the Director of the Division of Motor Vehicles has exceeded the statutory authority provided by the Legislature"?

Rule 12(b) says in pertinent part:

> (b) Every defense, in law or fact, to a claim for relief in any pleading,.... shall be asserted in the responsive pleading...except that the following defenses may at the option of the pleader be made by motion... (6) failure to state a claim upon which relief can be granted."

The Complaint (APP 28-36) described the mechanism of the DMV Closeout procedure and Scheduled Suspension notice and at APP 31,¶ 7:

> "All of the aforesaid was taken purportedly under the authority of N.J.S.A. 39:5-30(a)..."

Therefore it was plain to anybody that the DMV procedures were inconsistent with N.J.S.A. 39:5-30(a). This constituted an "administrative rule" under the state's Administrative Procedure Act. (APA) The Complaint alleged these DMV procedures were illegal and unconstitutional. To wit at APP 28,¶ 2: "This is an action ...to declare illegal the actions, practices and policies of defendant .. to declare unconstitutional the application herein of Automated Traffic System (ATS) Procedure,...DMV Closeout Procedure, Revision Date 01/14/93". The "administrative rule" was illegal and unconstitutional because it was not promulgated in accordance with the APA. So the Complaint was

verifying a fact when it said that the "practices and policies" of the DMV was illegal and unconstitutional.

The Defendant's brief, in support of the Rule 12(b)(6) motion, having due notice responded to this allegation by stating at APP 46 :

> "There is no evidence that the Director...has exceeded the statutory authority provided by the Legislature."

This is a statement of fact which the movant must demonstrate its validity. See 2 Moore's Federal Practice § 1234 (Matthew Bender 3rd Ed.). The Defendant should have annexed to the motion papers certified documentary evidence to show that the steps set forth in the APA had been complied with by the DMV to show that the Director did not exceed his statutory authority. This never happened.

The Director did not have jurisdiction nor had any substantial evidence before him to reasonably believe that the APA's mandatory Due Process provisions had been complied with to legalize the procedures it concocted. Consequently the Director did not have statutory authority nor have probable cause to indefinitely suspend the Petitioner's license because he disobeyed a DMV order to appear in municipal court .

Additionally this illegal order is an unjustified impairment of Petitioner's Fourth Amendment's liberty as this Court held in *City of Chicago v. Morales*,527 U.S. 41, 58, 119 S.Ct. 1849, 144 L.Ed.2d 67, 67 U.S. L.W. 4415, 72 ALR 5th 665 (1999).

The Defendant's motion papers also violated Fed.R.Civ.P. 7 as to particularity because the local rule requires briefs to secure the necessary information. See Wright & Miller, *Fed. Prac. and Proc.*, Civil 2d § 1192, p. 45, v. 5, 2nd Ed. 1990.

II. Whether a Rule 12(b)(6) proceeding resulting in the dismissal of Petitioners Complaint in District Court comported with the principles of Due Process?

Comparing the Defendant's brief with the District Judge's Opinion of April 6, 2001 (APP 46-55) shows that the Complaint was dismissed on grounds not raised by the Defendant in his brief. (APP 44-6) The Petitioner was not given advance notice and an opportunity to rebut the District Judge's dispositive legal argument, which is reversible error, as shown in *Berardi v. Swanson Memorial Lodge No. 48*, 920 F.3d 198, 200 (3rd Cir. 1990). It is also a Due Process violation under the law in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313-4, 70 S.Ct. 632, 94 L.Ed. 865 (1950) where this Court held that a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause, to wit:

> "Certainly the proceeding is one in which they may be deprived of property rights hence notice and hearing must measure up to the standards of due process..... The notice must be of such nature as reasonably to convey the required information"

III. Is it a recusable offense under 28 U.S.C. § 455(a) when the opinions accompanying a District Judge's orders are clearly erroneous and who refuses to consider a motion to vacate them by arbitrarily invoking the law of the case doctrine?

The District Judge's impermissible construction of N.J.S.A. 39:5-30, in which he excerpted a portion in a vacuum (APP 54), contradicted the construction by the New Jersey Supreme Court in *Atkinson v. Parsekian*, 37 N.J. 143, 151, 179 A.2d 732, 736 (1962). It also contradicted the law that was passed in 1913 which contained the same statutory excerpt shown on APP 37. The words in the 1913 law (APP 40-1) clearly shows that "the summons" could only mean one that was issued by the Commissioner of Motor Vehicles to attend a hearing **before him.** Nevertheless the District Judge interpreted it to mean a trial before a **municipal magistrate.**

The Complaint excerpted the same portion of the statute which was excerpted in *Atkinson* (see 37 N.J. 150, 179 A.2d 73)(APP 31,¶ 7) This was to demonstrate that there was nothing in the statute that authorized the DMV procedures. (APP 33-6)

Atkinson, supra at 37 N.J. 151, 179 A.2d 736:

> "The statute **provides for a standard administrative hearing** at which evidence is taken before the **Director** or such **departmental** employee as he may designate. In the latter case the hearer recommends to the **Director** whether the license shall or shall not be suspended or revoked. Based upon the evidence adduced at the hearing together with the hearing's officer's recommendation, the Director determines whether or not there has been a violation of a provision of the motor vehicle statute and acts accordingly. N.J.S.A. 39:5-30 **clearly** establishes a self-contained **administrative** procedure enabling the Director to determine whether or not any provision of the act has been violated. **There is no suggestion in the section that a proceeding before a magistrate,** or the Director sitting as a magistrate, is a condition precedent to action by the Director."

The District Judge's interpretation clearly and unequivocally contradicts the *Atkinson* construction. The District Judge ruled that the said statute allows a pre deprivation trial before a municipal magistrate (APP 47) and that this trial provides the Due Process underpinning to suspend a driver's license in New Jersey, (APP 53) and if the motorist does not appear at that trial then the statute allows the motorist's license to be revoked. (APP 54)

The instant matter was not an emergency situation whereby the Petitioner had previously been convicted in traffic court of three moving violations within a 12-month period as shown in *Dixon v. Love,*

431 U.S. 105, 97 S.Ct. 1723, 52 L.Ed2d 172 (1977). In *Dixon* this Court ruled that in this situation the Illinois Secretary of State could suspend a driver's license without a pre deprivation administrative hearing under a point system because it "indicated lack of ability to exercise ordinary and reasonable care in the safe operation of a motor vehicle or disrespect for the traffic laws and safety of other persons upon the highway."

Therefore the District Judge's ruling constitutes an "administrative rule". This comes within the purview of the state's Administrative Procedure Act, N.J.S. 52:14B-1 *et seq.*, (APP 41-3). The District Judge did not have jurisdiction to make such a ruling because "administrative rules" cannot be adjudicated thereby circumventing the intent of the Act. This ruling is illegal and a Due Process violation. See discussion infra.

To further demonstrate the District Judge's bias, he refused to analyze what he determined to be a novel theory under the Fourth Amendment in order to dismiss the Complaint. See APP 55. But this position is contradicted in a case handled by New Jersey District Judge Stephen M. Orlofsky in *Bowers v Nat'l Collegiate Athletic Association, et al,* 974 F. Supp.2d 459 (D.C. NJ 2000), to wit:

> "Once again, this protracted and hotly contested case alleging discrimination requires this Court to analyze and resolve a novel issue of law."

The same district judge also analyzed another case involving two novel issues of law in *Waterloo Gutter Protection System Co., Inc. v. Absolute Gutter Protection, et als,* 64 F.Supp.2d 398 (D.C.N.J. 1999)

Further bias is demonstrated when the District Judge ruled that the Petitioner's motion to vacate the Court's order that vacated the defendant's default was governed by Local Civil Rule 7.1 (g) and therefore it was untimely. See APP 50. Since the order to vacate was an interlocutory order it was governed by Fed.R.Civ.P. 54(b) and it was timely. The District Judge responded to Petitioner's motion by invoking the "law of the case"

doctrine, to wit, see APP 50: "Moreover, a motion for reconsideration is improper when it is used "to ask the Court to rethink what it has already thought through--rightly or wrongly." This statement is contradicted by *Picket v. Prince* 207 F.3d 402, 407-8 (7th Cir. 2000):

> "a judge's refusal to correct a plain error that he had committed weeks before is not justified by the doctrine of the law of the case or anything else we can think of."

If there was a conflict between a local rule and a federal rule, the federal rule prevails. Particularly disturbing by this ruling is the fact the same Court in the matter of *Electric Mobility Corporation v. Bourns Sensors/Controls, Inc., etc.* 87 F.Supp. 2d 394, 401 (D.C. NJ 2000), which preceded his decision by 13 months, in a case in which he originally presided over and was later assumed for some unknown reason by the Hon. Stephen M. Orlovsky, shows that his ruling was patently erroneous as argued in Petitioner's brief to show the Court below that there was something drastically wrong with the District Judge.

All the above was objected to by the Petitioner with motions to vacate. The District Judge refused under the "law of the case" doctrine.

Consequently the Petitioner moved the District Judge to recuse himself under 28 U.S. § 455(a) and *Liteky v. U.S.*, 510 U.S. 540,555, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994) (a valid basis for a bias or a partiality motion are accompanying opinions to judicial rulings).

The dispositive opinions were arbitrary, tricky and were not based upon what the District Judge had learned from the Complaint and by his participation in the proceedings.

IV. Does a complaint state a claim for which relief can be granted under 42 U.S.C. § 1983 by alleging that a licensing agency abused its state authority in that it had no substantial evidence proving its procedures had been perfected under the

Administrative Procedure Act which resulted in the illegal and unconstitutional seizure of a liberty and property interest?

The Complaint was dismissed under Rule 12(b)(6) on April 6, 2001. The civil rights Complaint (APP 28 - 36), clearly states that the actions, practices and policies described in the exhibits annexed to the complaint to be illegal and unconstitutional and for that reason the action comes within the meaning of the Fourth and Fourteenth Amendment. (APP 28, ¶¶ (2)(3).

When reviewing a motion to dismiss pursuant to Rule 12(b)(6) the material allegations of the complaint and its incorporated exhibits are true. *Walker Process Equip. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 174-75, 86 S.Ct. 347, 348-49, 15 L.Ed.2d 247 (1965), and liberally construe the complaint in favor of the plaintiff. See Fed.R.Civ. 8(f) and *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957) where this Court held that the burden was on the movant to prove that "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." Also see *Kehr Packaging, Inc. v. Fidelia, Inc.*, 926 F.2d 1406, 1409 (3d Cir. 1991) ("party moving for dismissal must bear burden of persuasion")

The Exhibits annexed to the Complaint (APP 33-6) constitute an interpretation by the DMV of a state statute. i.e N.J.S.A. 39:5-30. The procedures described in these exhibits, i.e. Scheduled Suspension notice and the DMV Closeout Procedure, compared with those in the state statute shown in part on APP 37-9 shows that they are in actuality an unperfected "administrative rule". Also they are contradicted by the construction of the said statute by the New Jersey Supreme Court in *Atkinson*, supra. The notation in the Scheduled Suspension notice itself (APP 36) shows it is an interpretation, to wit:

"Authority N.J.S.A. 39:5-30"

In *Metromedia, Inc. v. Director, Div. of Taxation*, 97 N.J. 313, 328-337, 478 A.2d 742 (1984) the

Supreme Court fully construed "administrative rule" and held there was invalid rule making because the Taxation Director did not obey the mandatory commands of the Administrative Procedure Act. (APA)

"Administrative Rule" in *Metromedia, supra* is defined in N.J.S.A. 52:14B-2(2)(e), to wit:

> "Administrative rule" or "rule", when not otherwise modified, means each agency statement of general applicability and continuing effect that implements or interprets law or policy, or describes the organization, procedure or practice requirements of any agency."

Therefore the aforesaid DMV suspension procedures are an "administrative rule". Even the Defendant's brief in support of its motion to dismiss, obviously referring to the said notation in the Scheduled Suspension, said (APP 45-6):

> "A court should grant more than mere deference or weight to the interpretation of a statute by the agency charged with its enforcement"

The allegation in the Complaint stated that the Scheduled Suspension notice was illegal. N.J.S.A. 52:14B-4(4)(a)(1) (APP 41), that was in effect in 1996, says in pertinent part:

> (a) Prior to the adoption, amendment, or repeal of any rule, except as may be otherwise provided the agency shall:
> (1) Give at least 30 days notice of its intended action.....The notice...shall be published in the New Jersey Register and shall be filed with the President of the Senate and the Speaker of the General assembly. The notice shall be additionally publicized in such manner as the agency deems most appropriate in order to inform those persons most likely to be affected by or interested in the intended action.
> (3) Afford all interested persons reasonable

> opportunity to submit data, views, or arguments and oral submissions respecting the proposed rule."
>
> (d) No rule hereafter adopted is valid unless adopted in substantial compliance with this act. A proceeding to contest any rule on the ground of noncompliance with the procedural requirements of this act shall be commenced within one year from the effective date of the rule.

In *State v. Klemmer*, 237 N.J.Super. 32, 566 A.2d 836 (L.D. 1986) at 237 N.J.Super 44, 566 A.2d 843 it says:

> "This limitation [this refers to the one year limitation period in paragraph (d) supra] is not applicable when notice of the proposed adoption of a rule has not been given and the rule has never been published."

237 N.J.Super 45, 566 A.2d 844, says:

> "Here the .. rules were, and are, **nonexistent legally** and in fact **unavailable** to those persons required to abide by them. They are therefore more offensive to constitutions than enactments which are only vague."

Klemmer shows that a state administrative agency adopted secret rules of procedure which subjected a convicted DWI offender to attend an Intoxicated Resource Center. The Law Court ruled that the procedures adopted without obeying the APA was a nullety. Therefore it was operating without rules and Due Process, holding the State abused its power to wit at 237 N.J.Super. 37, 836 A.2d 838:

> "it would be **highly improper** for the State to subject DWI offenders to IDC procedures **knowing** it had no right to do so. Such conduct would be **contrary** to every **concept of fair play**."

See also *Bello v. Walker*, 840 F.2d 1124, 1129

(3d Cir. 1988):

> "the deliberate and arbitrary abuse of governmental power violates an individual's right to substantive due process"

See also *Collins v. Harker Heights,* 503 U.S. 115, 125, 112 S.Ct. 106, 117 L.Ed.2d 261 (1992):

> "The Due Process Clause of the Fourteenth Amendment was intended to prevent government" 'from abusing [its] power, or employing it as an instrument of oppression' "

See also *Zinermon v. Burch,* 494 U.S. 113, 124-5, 110 S.Ct. 975, 108 L.Ed2d 100 (1990):

> "In Monroe, [v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed2d 492 (1961) this Court rejected the view that 1983 applies only to violations of constitutional rights that are authorized by state law, and does not reach abuses of state authority that are forbidden by the State's statutes or Constitution or are torts .... As was noted in Monroe, in many cases there is "no quarrel with state laws on the books." Id at 176; instead the problem is the way those laws are or are not implemented by state officials".....the Due Process Clause contains a substantive component that bars certain arbitrary, wrongful governmental actions "regardless of the fairness of the procedures used to implement them"

In *Monroe v. Pape,* 365 U.S. 168, 184 it says:

> "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law"

To state a valid cause of action under § 1983, *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 150, 90 S.Ct.

1598, 26 L.Ed 142 (1970) held a plaintiff must demonstrate:

(1) the defendant(s) deprived him of a right secured by the Constitution or any law of the United States;

(2) the deprivation of that right resulted from the defendant(s) acting under color of law.

See Also *Board of Educ. V. Cooperman*, 209 N.J.Super. 174, 507 A.2d 253 (A.D. 1986) where it says at 507 A.2d 263:

> "Therefore, where agency policy is adopted internally without proper promulgation and allowance for comment, it should not be binding, since there has been no opportunity for public input and no public awareness of the rule with which the public is supposed to comply."

The *Klemmer* and *Cooperman* decisions are reflected in *City of Chicago v. Morales*, 571 U.S. 41, 59, 119 S.Ct. 1849, 144 L.Ed.2d 67, 67 U.S.L.W. 4415, 72 A.L.R.5th 665 (1999):

> "Because an officer may issue an order only after prohibited conduct has already occurred, it cannot provide the kind of advance notice that will protect the putative loiterer from being ordered to disperse. Such an order cannot retroactively give adequate warning of the boundary between the permissible and the impermissible applications of the law"

If in fact the DMV procedures, i.e the Scheduled Suspension Notice and Closeout Procedure, were promulgated without first complying with the notice and opportunity to respond requirements in the APA they would be illegal and unconstitutional, as alleged in the Complaint, because any action to enforce them would be arbitrary and wrongful despite the fairness of the procedures used to implement their enforcement.

The unescapable fact is that they were not promulgated under the APA, they were strictly secret internal DMV documents . This can easily be proven in court under Fed.R.Civ.P. 34, to have the Defendant produce the documents, set forth in the APA, to show compliance. The District Judge's ex parte decision to dismiss the complaint without allowing discovery proceedings to determine whether there was evidence to support the allegations violated Rule 12(b)(6) as taught by this Court in Conley. Supra at 355 U.S. 47:

> "Such simplified 'notice pleading' is made possible by the liberal opportunity for discovery and other pretrial procedures established by the rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues" .

V. Whether the constitutional validity of an administrative agency's procedures that impacts the motoring public should be resolved in the public interest as the issues are bound to recur in the future?

Dismissal of the Complaint will not terminate its issues as "the controversy is not moot, since the public problem persists. Furthermore "a court may decide an issue even though the litigation has become moot,...in the public interest." (citations) Preliminarily, we disagree with respondents contention that the appeal is moot....The public interest warrants a resolution of the matter since the issues are of public importance and are bound to recur in the future." *Klemmer* at 237 N.J.Super 38-9. 566 A.2d 839-40.

VI. Can a District Judge's dismissal of a 42 U.S.C § 1983 claim under Rule 12(b)(6) be voided because its basis was an unperfected "administrative rule"?

The District Judge's inconsistent interpretation of the enabling statute. (APP 54) was actually an illegal unperfected "administrative Rule". This type of tactic is

shown in *Glaser v. Downes*, 126 N.J.Super. 10, 312 A.2d 654 (A.D. 1973) certif. den. 64 N.J. 513, 317 A.2d 726 (1974). In *Glaser* a trial court judge interpreted the governing statute, N.J.S.A. 56:6-2(e), and ruled that any gas station's operating license could be suspended for a purported violation that pertained to "giveaways" to customers. This interpretation forbade giving away any merchandise as a promotional gimmick to encourage customers to trade at Shell, Mobil and Exxon gas stations and ordered the Director to effectuate his order. The intermediate appellate court over ruled this tactic at 126 N.J.Super. 19, 312 A.2d 659, to wit:

> "Moreover, the court could not suggest to or order the Director to act in violation of the Administrative Procedure Act".

The APA had to have been complied with prior to the trial court judge's decision otherwise it was an unperfected "administrative rule". The trial judge was in no better position to force compliance with the unperfected "rule" than an administrative agency would have been in lieu of first complying with the APA.

The instant matter shows that the District Judge interpreted a phrase in N.J.S.A. 39:5-30(a) taken out of context. This tactic contradicts this Court's decision in *Tyler v. Cain*, 533 U.S. 656, 121 S.Ct. 13, 150 L.Ed 632 (2001). The excerpted phrase says:

> "A person who fails to obey the summons shall be subject to a penalty not exceeding $100.00 to be recovered with costs in an action at law, prosecuted by the Attorney General, and in addition the vehicle registration or driver's license, or both, as the case may be, shall forthwith be revoked"

Comparing this phrase with the facts set forth in the Complaint and with the Scheduled Suspension Notice shows that the District Judge was incorporating the **traffic ticket summons to a municipal court trial** into the excerpted phrase. This tactic contradicts the

ruling in *Atkinson,* supra and was the same illegal tactic used by the trial judge in *Downe's* supra.

N.J.S.A. 39:5-30 is a penal statute, *State v. Polsky,* 216 N.J.Super. 549, 552, 524 A.2d 474, 475-6 (L.D. 1986) which must be strictly construed against the state, *State v. Gilfressis,* 148 N.J.Super. 369, 374, 372 A.2d 680, 682-3 (Co 1977)).

Therefore when the phrase says "revoked" the District Judge interpreted that to mean "suspended". Any dictionary will show that "revoked" is not synonymous with "suspended". Also the Petitioner was never subjected to a penalty of no more than $100.00, the Petitioner's driver's license was not FORTHWITH revoked and was never prosecuted by the attorney general. It was suspended after being given 59 days notice to appear in municipal court in order to subject his person to its in personam jurisdiction.

Traffic ticket proceedings in New Jersey are quasi-criminal in nature, therefore the rules of criminal procedure attaches to them. *State v. Bookbinder,* 82 N.J.Super. 179, 197 A.2d 35 (A.D. 1964).

In order for a municipal court to get in personam jurisdiction, an alleged traffic violator either voluntarily appears in court or is arrested pursuant to an arrest warrant and forcibly brought into court.

The District Judge held in his opinion that the Scheduled Suspension Notice derived its authority from his excerpted phrase taken in a vacuum. (See APP. 53) This interpretation of the statute constituted an "administrative rule" as defined in the APA.

The fatal error is that the District Judge does not supply any evidence or cite any authority showing that the mandatory APA procedures had preceded his interpretation to legalize it. Just as the trial judge in *Downes,* supra was powerless to have the Director of Taxation effectuate his order, so was the District Judge powerless to dismiss the Petitioner's Complaint grounded on an unperfected "administrative rule".

VII. Can a District Court dismiss a 42 U.S.C. § 1983 complaint under Rule 12(b)(6) purportedly because Due Process was provided that justified the suspension of a driver's license when:

1) A driver did not appear in municipal court after being served a traffic summons by a police officer?

2) A driver did not appear in municipal court pursuant to an administrative agency order?

The District Judge's excerpted a portion of N.J.S.A. 39:5-30(a) in order to show that the Petitioner was accorded Due Process to justify the suspension of his driver's license. (APP 54) The excerpt standing alone is unconstitutionally over broad because it sweeps in a great variety of conduct under a general and indefinite characterization and leaving to the executive and judicial branches too wide a discretion in its application as this Court held in *Cantwell v State of Connecticut,* 310 U.S. 296, 308 (1940)

In other words "a person who fails to obey the summons" could mean anybody, regardless of the factual underpinning, who fails to answer any type of summons to appear at any hearing or trial or lineup, etc. issued by any state or federal authority thereby their driver's license could be revoked forthwith.

This is absurd and the New Jersey State Legislature never intended for this to happen because reading the enabling statute as a whole, as taught by this Court in *Tyler,* supra, shows that the summons referred to in the District Judge's excerpted phrase, is one served upon a witness to attend an administrative hearing before the director or designated administrative employee, and not to appear before a municipal court judge. See (APP 37,40) and *Atkinson v. Parsekian,* supra at 37 N.J. 151, 732 A.2d 736:

> "The Statute provides for a **standard administrative hearing** at which evidence is taken **before the Director** or such **departmental** employees as he may designate.... N.J.S.A. 39:5-30 clearly

> establishes a self contained **administrative** procedure. **There is no suggestion in the section that a proceeding before a magistrate....is a condition precedent** to action by the Director"

VIII. Whether the procedures propounded by an administrative agency to suspend a driver's license purportedly pursuant to a state statute violated the driver's constitutional rights under the Fourteenth Amendment's Equal Protection Clause?

The New Jersey Supreme Court in *Atkinson*, supra was construing what is now N.J.S.A. 39:5-30(a). Paragraphs (b)(c)(d) were added in 1977.

Nevertheless paragraph (b)(4), see APP 38, shows that an alleged violator received Due Process, To wit:

> "in the notice the director shall provide the individual charged with an opportunity for a plenary hearing to contest the proposed final suspension"

The *Atkinson* construction of N.J.S.A. 39:5-30(a) is the same as is delineated in N.J.S.A. 39:5-30(b). The reason that it is specifically set forth in paragraph (b) is that the designated statutory violations are the most serious and the Legislature wanted to make sure that Due Process was even afforded to those alleged violators.

See *Cresse v. Parsekian*, 81 N.J.Super. 537, 549, 196 A.2d 256, 262 (A.D. 1963) in which N.J.S.A. 39:4-144 was involved. This case held that the DMV Director does not have unfettered discretion to suspend a driver's license because there had been an administrative pre deprivation hearing before an administrative law judge, but it only determined whether Cresse had violated said statute. Based solely on this determination the Director summarily suspended Cresse's license.

On appeal, the Appellate Division, after construing what is now N.J.S.A. 39:5-30(a), held that an additional hearing must be had on the question of

the license suspension penalty, at 81 N.J.Super. 546, 196 A.2d 261, and the factors to be weighed (81 N.J. Super. 549, 196 A.2d 262-3) are:

> "The Director must weigh each case individually to determine whether suspension is required at all for the purpose above mentioned, and if so, for how long. Among other things, he should consider the facts which constitute the particular violation, whether the motorist was wilful or reckless or merely negligent, and if merely negligent, how negligent, how long the motorist has been driving, whether this is his first offense, whether he has been involved in any accidents, his age and physical condition, whether there was any aggravating circumstances such as drinking, or on the other hand whether there were extenuating circumstances....upon these and all other facts and circumstances, as a matter of prophylaxis and not of punishment, that a motorist should be kept off the highway and if so, for how long?

The *Cresse* opinion was affirmed by the New Jersey Supreme Court at 43 N.J. 326, 329, 204 A.2d 348 (1964), to wit:

> "On the remand the Director will conduct an individual hearing in the manner called for by the Appellate Division at (81 N.J. Super. at p. 549, 196 A.2d 256) and will determine whether Cresse should be suspended and for how long"

Based on *Cresse* the DMV Scheduled Suspension Notice, (APP. 35), has no basis in New Jersey law and is inconsistent with the enabling statute N.J.S.A. 39:5-30. Therefore the District Judge's dispositive opinion is patently confusing, nonsensible,

and erroneous, to wit on APP 53 :

> "While the statute authorizes the director to summon witnesses to appear or give testimony, it does not require the director to do so. Accordingly, Defendant did not violate Plaintiff's Fourteenth Amendment rights to due process when it suspended his driver's license and did so using the ATS and DMV "close out" procedures."

The above statement is clearly erroneous and is repugnant to Due Process. The Supreme Court ordered an individual administrative hearing in *Cresse* on whether his driver's license should be suspended. Therefore the DMV Pending Suspension Notice which orders a municipal court hearing does not comport with Due Process. There is nothing in N.J.S.A. 39:4-144 (APP 36) that gives a municipal court magistrate jurisdiction to suspend a driver's license for its violation. This magistrate can only fine that person for its violation. Therefore contrary to the District Judge's opinion the Petitioner was not provided Due Process under the Defendant's convenient illegal procedures.

16C C.J.S. § 968, p. 254,260-1. *Procedural Aspect*, says in part:

> "Due process of law requires....The opportunity to be heard .... to be adequate, fair, full or reasonable, and afforded at a meaningful time and in a meaningful manner. The hearing or defense must be before a competent, or a just, equitable and fair and impartial court or tribunal having jurisdiction of the cause."

If this is the correct interpretation of the law, then there was no statutory violation committed by the Petitioner and his conduct would be innocent and therefore the order by the Director to appear in municipal court "is an unjustified impairment of liberty". See *City of Chicago v. Morales*, 527 U.S. 41, 58,

119 S.Ct. 1849, 144 L.Ed2d 67, 72 A.L.R. 5th 665 (1998).

The DMV illegal procedures are clearly discriminatory. Under this scheme when an alleged violation of N.J.S.A. 39:4-144 occurs without serious injury or death, there is no individual pre deprivation administrative hearing offered to determine whether to suspend a driver's license. Contrarily those who allegedly violate N.J.S.A. 39:4-98, N.J.S.A. 4-50, N.J.S.A. 4-96, N.J.S.A. 4-129 under N.J.S.A. 39:5-30(b); and under N.J.S.A. 39:5-30(c), for any alleged violation of Title 39 where there is a fatal accident, a driver is routinely accorded an individual pre deprivation administrative hearing to determine whether to suspend the driver's license..

Therefore the primary effect of the said illegal DMV procedures is not Due Process but only to act as an agent of the state's judiciary, which violates the separation of powers act, by frightening a driver into municipal court thereby circumventing the Fourth Amendment's warrant clause.

All of which is an abuse of governmental authority and an intentional denial of equal protection under the Fourteenth Amendment.

IX. Can a District Judge refuse to consider a novel theory that applied Fourth Amendment principles to the Seizure of a motor vehicle owner's driver's license, in order to dismiss a complaint for failure to state a claim for which relief can be granted?

The facts alleged in the Complaint clearly said that the Defendant had no substantial evidence before him when his license was indefinitely suspended to this day. (APP 34, ¶ a) Also alleged is that a vehicle owner's driver's license is a liberty and property interest which cannot be seized without an impartial court official finding probable cause.

If these general allegations of facts are true then the suspension was a "seizure" of Petitioner's liberty and property interest. To wit see *Soldal v.Cook County Illinois,* 506 U.S. 56, 61, 113 S.Ct. 538, 121 L.Ed.2d

450 (1992) ("A "seizure" of property, we have explained when there is some meaningful interference with an individual possessory interests in that property.")

David v. Strelecki, 97 N.J.Super. 360, 368, 235 A.2d 195, 199 (A.D. 1967) ("A revocation or suspension of driving privileges is deemed to be civil in nature. But its result can be a deprivation of liberty and of property rights in a license to drive an automobile")

Wall v. King, 206 F.2d 878, 882 (1st Cir. 1953):

> "We have no doubt that the freedom to make use of one's own property, here a motor vehicle, as a means of getting about from place to place, whether in pursuit of business or pleasure, is a 'liberty' which under the Fourteenth Amendment cannot be denied or curtailed by a state without due process of law."

In *Miller v. Depuy,* 397 F.Supp. 166, 172 (E.D.PA 1969) which is a driver's license suspension case:

> "The right to drive an automobile is integrally bound up in the right to travel guaranteed by the Supreme Court's interpretation of the United States Constitution. See *United States v. Guest,* 383 U.S. 745, 86 S.Ct. 1170, 16 L.Ed2d 239 (1966) "

The District Judge dismissed the Fourth Amendment claim under Rule 12(b)(6) because "The Court, however, knows of no authority that supports Plaintiff's novel position." (APP 53)

This ruling is clearly erroneous. To wit: Wright & Miller, *Fed. Pract. & Proc:* Civil 2d § 1357, v. 5A, p. 341-2, 2d Ed. (1990) says:

> "The court should be especially reluctant to dismiss on the basis of the pleadings when the asserted theory of liability is <u>novel</u> or extreme, since it is important that new legal theories be explored and assayed in the light of actual facts rather than a pleader's suppositions...As a practical

matter, a dismissal under Rule 12(b)(6) is likely to be granted in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief."

New Jersey District Judge Stephen M. Orlofsky, in *Bowers v Nat'l Collegiate Athletic Association, et al,* 974 F.Supp.2d 459 (D.C. NJ 2000) held:

"Once again, this protracted and hotly contested case alleging discrimination requires this Court to analyze and resolve a novel issue of law."

The same district judge analyzed two novel issues of law in *Waterloo Gutter Protection System Co., Inc. v. Absolute Gutter Protection, et als,* 64 F.Supp.2d 398 (D.C.N.J. 1999).

In *Albright v. Oliver,* 510 U.S. 266, 273, 114 S.Ct. 807, 127 L.Ed2d 114 (1994) this Court held that a complaint claiming the right to be **free from prosecution** without probable cause must be judged under the Fourth Amendment.

The Complaint shows that the DMV was enforcing a bogus arrest warrant by prosecuting the Petitioner without probable cause because there was no substantial evidence before the Director showing compliance with N.J.S.A. 39:5-25 and the APA. This Fourth Amendment violation occurred prior to the commencement of the suspension proceedings. To wit at APP 31.

"(8) The defendant had no substantial factual evidence before him when the bogus arrest warrant unlawfully triggered the suspension proceedings on January 30, 1996."

"(10) A driver's license of a vehicle owner not only involves a property but a liberty interest. These interests are protected by the Fourth Amendment to the United States Constitution which prohibits seizures without a finding of probable cause."

Therefore the District Judge's decision not to judge the case under the Fourth Amendment was clearly erroneous. This decision was affirmed by the court below without comment and is a basis for this Court to grant a Writ of Certiorari.

CONCLUSION

This Court should review this case because the undermining of the Fourth Amendment and the Fourteenth Amendment's Due Process and Equal Protection clauses is a matter of substantial importance and concern to the motorized public in New Jersey and elsewhere. For these reasons, it is respectively submitted that this petition for a writ of certiorari be granted.

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APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

RUSSELL E. LERMAN, on behalf of all others Similarly situated, Plaintiff	) Civil Action No.)))
v.	) **Complaint**
ALBERT ARI, Acting Director, State of New New Jersey, Division of Motor Vehicles Defendant	)) ORIGINAL FILED) JUL 18 2000) William T. Walsh, Clerk)

Plaintiff, complaining of defendant says:

I JURISDICTION

(1) This is an action pursuant to 28 U.S.C. § 1343(a)(3)(4) to redress the deprivation of plaintiff's constitutional rights by the defendant acting under color of state law as more particularly prohibited by 42 U.S.C. § 1983.

(2) This is an action pursuant to the Fourth and Fourteenth Amendments to the United States Constitution, to redress the deprivation by defendant of plaintiffs' rights under those Amendments.

(3) This is an action pursuant to 28 U.S.C. §§ 2201, 2202 to declare illegal the actions, practices and policies of defendant hereinafter described, to declare unconstitutional and permanently enjoin the enforcement of N.J.S.A. 39:5-30(a) and to declare unconstitutional the application herein of Automated Traffic System (ATS) Procedure, State of New Jersey, Administrative Office of the Courts, Municipal Court services Division, DMV Closeout Procedure, revision Date: 01/14/93, conformed copy of which annexed herein.

II. PARTIES

(1) Plaintiff is a United States citizen, and has at all times pertinent to this action been a resident of Morris County, new Jersey.
(2) Defendant is described in the caption, which is incorporated herein by reference. Defendant is sued only by virtue of his office.

III. CLASS ACTION

(1) This is a class action brought by the plaintiff on his behalf and on behalf of all other persons similarly situated, pursuant to Rule 23 of the Federal Rules of Civil Procedure. The class consists of all New Jersey citizens who were subjected to arbitrary and illegal indefinite suspensions of their driving licenses under the aforesaid unconstitutional state statute and DMV close-out procedure.
(2) The class is so numerous that joinder of all members is impractical, there are questions of law and fact common to the class, the representative plaintiff will fairly and adequately protect the interests of the class, the party defendant have an acted on grounds generally with respect to the class as a whole.

IV. CAUSE OF ACTION

(1) Plaintiff was driving his car on October 29, 1995. After going by a tavern at about 10:35 PM he was stopped by Randolph Township police officer David Stokoe who violated N.J.S.A. 39:5-25 by issuing a bogus traffic ticket. It falsely accused plaintiff of violating N.J.S.A. 39:4-144. (Failure to stop or yield at an intersection)
(2) The ticket was facially fatally defective because the officer set the trial date on the ticket for November 1, 1995. This shortened date violated the due process clause in the Fourteenth Amendment to the United States Constitution. Former New Jersey court rule 7:6-

4, now 7:12-1, allows at least five days to appear and defend on the merits.
(3) The plaintiff never appeared in the Randolph Township Municipal Court, never submitted his person to its jurisdiction and was never convicted.
(4) Consequently, the municipal court, as in all non appearance cases, automatically disseminated a computer generated arrest warrant into the ATS computer system which violated the Fourth Amendment's warrant clause, i.e. "no warrants shall issue but upon probable cause, supported by oath or affirmation". This routinely occurs because the police officer, such as David Stokoe, never swears out a complaint under penalty of perjury before an authorized municipal court official, nor does a municipal court official find that there was a probability that a traffic violation had in fact occurred. Nevertheless the bogus warrant, dated on December 22, 1995, bearing the name of the municipal court judge, commanded the arrest of the plaintiff to answer a complaint charging a violation of N.J.S.A. 39:4-144 within the jurisdiction of the municipal court.
(5) The warrant went unexecuted for the minimum of 30 days therefore the computer controlled state operated ATS automatically closed out the "complaint".
(6) The ATS provides the Division of Motor Vehicles (DMV) with weekly electronic transmittals of all close-outs every Thursday night. This triggers the DMV computer system which electronically prepares a Pending Suspension Notice and sends it to the defendant in the underlying municipal court action, (conformed copy of which is annexed herein) and allows 60 days (not 45 days as stated in the annexed ATS procedure) for the defendant to submit to the jurisdiction of the municipal court or otherwise the defendant's driver's license will be suspended. The New Jersey Supreme Court and courts in other jurisdictions have ruled the quasi-criminal proceeding in the municipal court is not binding on the issue of whether

a driver's license should be suspended, which is the cause in a DMV administrative proceeding and a civil matter. See point (7) infra.

(7) All of the aforesaid was taken purportedly under the authority of N.J.S.A. 39:5-30(a) whose sole object is to foster safety on the highway by removing unsafe drivers, and not to impose criminal punishment to vindicate public justice. This statute, which is repugnant to the constitution because notably it has a catchall vague standard of guilt clause and grants blanket discretionary authority to defendant whether he will conduct an administrative pre deprivation hearing, says in part: "every license to drive motor vehicles may be suspended or revoked by the director for a violation of any of the provisions of this Title or on any other reasonable grounds, after due notice in writing of such proposed suspension, revocation and the ground thereof. He may also summon witnesses to appear before him at this office or at any other place he designates, to give testimony in a hearing which he holds looking toward a revocation of a license issued by or under his authority. The actual conduct of said hearing may be delegated by the director to such departmental employees as he may designate, in which case the said employees shall recommend to the director in writing whether the said licenses shall or shall not be suspended or revoked"

(8) The defendant had no substantial factual evidence before him when the bogus arrest warrant unlawfully triggered the suspension proceedings on January 30, 1996.

(9) Nor did the defendant have any substantial factual evidence before him on or about March 29, 1996, when the plaintiff's driver's licenses was indefinitely suspended to this day.

(10) A driver's license of a vehicle owner not only involves a property but a liberty interest. These interests are protected by the Fourth Amendment to the United States Constitution which prohibits seizures

without a finding of probable cause, and the due process clause of the Fourteenth amendment to the United States Constitution which minimizes the risk of an erroneous deprivation. The director has sole subject matter jurisdiction over the issuance or suspension of drivers' licenses relative to the underlying facts in the instant matter. The policy and procedures adopted by the defendant under the unconstitutional discretionary clause concerning a pre deprivation hearing in N.J.S.A. 39:5-30(a) are in themselves unconstitutional as the "irrebuttable presumption doctrine" came into existence in the 1970's where it was struck down by the United States Supreme Court in the *Bell v. Bursen* line of cases. After which in 1979 the attorney general of New Jersey in a formal opinion indirectly reversed a 1960 formal opinion that used the said illegal doctrine to interpret the said statute. Nevertheless the state legislature has failed to act. In spite of judicial pronouncements, the said statute still does not mandate that the director conduct a pre deprivation hearing at a meaningful time and manner appropriate to the nature of the case. To minimize the risk of an erroneous deprivation this hearing should be supported by sworn evidence subjecting the police officer to civil liability and criminal penalty for willful misrepresentation of facts. Similar statutes in other jurisdictions throughout this nation use this scheme even in "emergency" situations, such as drunken driving cases, where in lieu of a pre deprivation hearing, an ex parte determination is made. Also this scheme has been elucidated and endorsed by the United States Supreme Court in notable cases. Consequently N.J.S.A. 39:5-30(a) is in derogation of the due process clause of the Fourteenth Amendment to the United States Constitution.

V. EQUITABLE RELIEF

(1) Plaintiff and members of the class have no plain, adequate or complete remedy at law, and have suffered

and will continue to suffer irreparable harm unless defendant is enjoined from continuing illegal actions, practices and policies, maintained and conceived in bad faith, for his own personal convenience, whereby denying plaintiff, and members of the class their constitutional rights above enumerated. The acts of the defendant are of a continuing nature and unless enjoined will force the plaintiff and members of the class to prosecute a multiplicity of suits to obtain redress. A mere award of damages to plaintiff will not be adequate to protect him and members of the class.

WHEREFORE, plaintiff prays:

(1) That the Court treat this verified Complaint as an affidavit and permanently enjoin defendant from further interfering with the constitutional rights of plaintiff and members of the class and causing irreparable harm which is both great and immediate because of the deprivation of their drivers' license in derogation of the above enumerated violations of the United States Constitution.

(2) That the Court order the defendant to reinstate plaintiff's driver's license.

(3) That plaintiff have such other and further relief as is merited in the premises.

DATED: July 18, 2000

/s/ Russell E. Lerman

Russell E. Lerman, Pro Se

(EXHIBIT ANNEXED TO COMPLAINT)

DMV CLOSEOUT PROCEDURE

State of New Jersey
Administrative Office of the Courts
Municipal Court Service Division
DMV Closeout Procedure
Revision Date: **01/14/93**

Non-Parking Violations for Defendants
Who Live in New Jersey

1. For Moving Violations where defendants have a New Jersey License (see Rule 7:6-3(b)): defendants who fail to appear at the scheduled court date, or fail to satisfy a payable complaint by the court date, will be eligible for an ATS Failure to Appear Notice (FTA). The FTA notice will include a new Court Date or Pay By Date.
2. If the defendant does not respond to the FTA notice, the case will become eligible for a warrant. By Court Rule, a warrant must be issued. After issuance, if the warrant goes unexecuted, the system will Close-Out the complaint 31 days after the warrant issue date. If the autopic information is correct, DMV will initiate the Suspension Procedure.
3. ATS provides the Division of Motor Vehicles with a weekly electronic transmittal of all Close-Outs every Thursday night. The Division sends a Pending Suspension Notice to the defendant and gives the defendant 45 days to satisfy the matter.
4. If the defendant decides to contest the complaint after it has been Closed, the court should enter plea of Not Guilty into the system, and schedule the complaint for court. If the scheduled court date is after the defendant's DMV Proposed Suspension Date, the defendant must inform the Division of the pending trial. DMV will then determine if they will stay the suspension.
5. If the defendant is found guilty, and pays the court imposed penalties, the ATS receipt must be presented to DMV as proof that the complaint was satisfied, and request license restoration.
6. If a judge finds a defendant not guilty or dismisses a case after the complaint is closed to DMV, the court should advise the defendant of the responsibility to inform DMV that the complaint has been satisfied. DMV may access ATS to confirm that the case is disposed.

(EXHIBIT ANNEXED TO COMPLAINT)

DMV SCHEDULED SUSPENSION NOTICE

State of New Jersey
Division of Motor Vehicles
228 East State Street
Trenton, New Jersey 08606
Date Prepared: 01/30/96
Russell E. Lerman
P.O. Box 451
Dover, NJ 07802-0451
D.L. Number L2712 68065 05365

DATE PREPARED: 01/30/96

YOUR NEW JERSEY DRIVING PRIVILEGE(S) IS (ARE) SCHEDULED TO BE SUSPENDED ON 03/29/96 INDEFINITELY .
MOTOR VEHICLE SERVICES HAS SCHEDULED THE SUSPENSION OF YOUR NEW JERSERY DRIVING PRIVILEGE BECAUSE YOU FAILED TO ANSWER SUMMONS(ES) IN THE FOLLOWING COURT:

CT NAME: RANDOLPH TWP MUN COURT
STREET: 502 MILLBROOK AVENUE
CITY: RANDOLPH
ST: NJ
ZIP: 07869
DETAILS OF YOUR UNANSWERED SUMMON(ES) ARE SHOWN ON THE BACK OF THIS NOTICE.
CONTACT THE COURT CLERK OF THE ABOVE COURT TO SCHEDULE A DATE TO APPEAR IN COURT TO SATISFY THE SUMMON(ES).
TAKE THIS NOTICE WHEN YOU GO TO COURT. IF YOU ARE ORDERED TO PAY FINES, BE SURE TO OBTAIN RECEIPTS FOR YOUR PAYMENT.
THE RECEIPT(S) MUST INDICATE THE NAME OF THE COURT, THE SUMMONS NUMBER(S), THE COURT'S DOCKET NUNBER(S), THE DATE(S) OF THE VIOLATION(S), AND THE DATE THE SUMMONS(ES) WERE SATISFIED. IF THIS INFORMATION IS NOT

SHOWN ON THE RECEIPT(S), MOTOR VEHICLE SERVICES CANNOT ACCEPT THE RECEIPT(S) AS PROOF THAT YOU PAID THE SUMMONS(ES). RECEIPT THAT THE SUMMONS(ES) ARE SATISFIED MUST BE RECEIVED BEFORE THE SUSPENSION DATE OR YOUR NEW JERSEY DRIVING PRIVILEGE WILL BE SUSPENDED AND YOU WILL HAVE TO PAY A $50 RESTORATION FEE. (AUTHORITY N.J.S.A. 39-5-30)

/s/ C. Richard Kamin

C. Richard Kamin, Director

APPLICABLE STATE STATUTES

TITLE 39

MOTOR VEHICLES AND TRAFFIC REGULATION

39:4-144:

No driver of a vehicle or street car shall enter upon or cross an intersecting street marked with a "stop" sign unless he has first brought his vehicle or street car to a complete stop at a point within 5 feet of the nearest crosswalk or stop line marked upon the pavement at the near side of the intersecting street and shall proceed only after yielding the right of way to all traffic on the intersecting street which is so close as to constitute an immediate hazard. No driver of a vehicle or street car shall enter upon or cross an intersecting street marked with a "yield right of way" sign without first slowing to a reasonable speed for existing conditions and visibility, stopping if necessary, and the driver shall yield the right of way to all traffic on the intersecting street which is so close as to constitute an immediate hazard; unless, in either case, he is otherwise directed to proceed by a traffic or police officer or traffic control signal, or as provided in section 39:4-145 of this title.

Amended by L.1956, c. 107, p.486, s. 5; L.1958, c.114, p. 588, s.4.

39:5-30:

a. Every registration certificate and every license certificate. Every privilege to drive motor vehicles, including commercial motor vehicles as defined in P.L. 1990, c. 103 (C.39:3-10.9 et seq.), every endorsement, class of license, and commercial driver license, may be suspended or revoked, and any person may be prohibited from obtaining a driver's license or a registration certificate, or disqualified from obtaining any class of a driver's license or a registration certificate, or disqualified from obtaining any class of or endorsement on a commercial driver license, and the reciprocity privilege of any nonresident may be suspended or revoked by the director for a violation of any of the provisions of this Title or on any other reasonable grounds, after due notice in writing of such proposed suspension, revocation, disqualification or prohibition and the ground thereof.

He may also summon witnesses to appear before him at his office or at any other place he designates, to give testimony in a hearing which he holds looking toward a revocation of a license or registration certificate issued by or under his authority. The summons shall be served at least 5 days before the return date, either by registered mail or personal service. A person who fails to obey the summons shall be subject to a penalty not exceeding $100.00, to be recovered with costs in an action at law, prosecuted by the Attorney General, and in addition the vehicle registration or driver's license, or both, as the case may be, shall forthwith be revoked. The fee for witnesses required to attend before the director shall be $1.00 for each day's attendance and $0.03 for every mile of travel by the nearest generally traveled route in going to and from the place where the attendance of the witness is required. These fees shall be paid when the witness is excused from further attendance, and the disbursements made from payment of the fees shall be audited and paid in the manner provided for expenses of the department. The actual

conduct of said hearing may be delegated by the director to such departmental employees as he may designate, in which case the said employees shall recommend to the director in writing whether the said licenses or certificate shall or shall not suspended or revoked .

b. Whenever a matter is presented to the director involving an alleged violation of

(1) R.S. 39:4-98, where an excess of 20 miles per hour over the authorized speed limit is alleged, and which has resulted in the death of another;

(2) R.S. 39:4-50, and which has resulted in the death of another;

(3) R.S. 39:4-96, and which resulted in the death of another; or

(4) R.S. 39:4-129, wherein the death of another has occurred, and the director has not determined to immediately issue a preliminary suspension pursuant to subsection e. of this section, the director shall issue a notice of proposed final suspension or revocation of any license certificate or any non resident reciprocity privilege to operate any motor vehicle or motorized bicycle held by the individual charged or temporary order prohibiting the individual from obtaining any license to operate any motor vehicle or motorized bicycle in the state.

In the notice, the director shall provide the individual charged with an opportunity for a plenary hearing to contest the proposed final suspension, revocation or other final agency action. Unless the division receives, no later than the 10th day from the date the notice was mailed, a written request for hearing, the proposed final agency action shall take effect on the date specified in the notice.

Upon receipt of a timely request for a plenary hearing, a preliminary hearing shall be held by an administrative law judge within 15 days of the receipt of the request. The preliminary hearing shall be for the

purpose of determining whether, pending a plenary hearing on the proposed final agency action, a preliminary suspension shall be immediately issued by the judge. Adjournment of such hearing upon motion by the individual charged shall be given only for good cause shown.

c. Whenever any other matter is presented to the director involving an alleged violation of this title, wherein the death of another occurred and for which he determines immediate action is warranted, he may proceed in the manner prescribed in subsection b. above.

Amended by L. 1990, c. 103, s. 33, eff. Nov. 9, 1990.

39:5-25:

Any law enforcement officer may, without warrant, arrest any person **violating in his presence** any provision of chapter 3 of this Title, or any person, other than a motorman or person having control of a strret car or auto bus, running upon a route approved the Board of Public Utilities, violating in his presence any provision of chapter 4 of this Title. A law enforcement officer may arrest without a warrant any person who the officer has probable cause to believe has operated a motor vehicle in violation of R.S. 39:4-50 or section 5 P.L. 1990, c. 103 (C.39:3-10.13), regardless of whether the suspected violation occurs in the officer's presence. The exemption from arrest of a motorman or person having control of a street car or auto bus, as conferred herein shall not operate to prevent his arrest, however, for a violation of R.S. 39:4-50. The arresting officer shall bring any person so arrested before any judge of the municipal court of the municipality wherein the offense is committed, or before the director at any place designated as his office. If the arrest is for a violation of R.S. 39:4-50, the arresting officer may, if no judge, clerk or deputy clerk is available, detain the person arrested, either in any police station, lockup or other place maintained by any

municipality for the detention of offenders or in the common jail of the county, for such reasonable time as will permit the arresting officer to obtain a warrant for the offender's further detention, which temporary detention shall not exceed 24 hours from the time of the arrest. If the arrest is for a violation of any other provision of this subtitle, the person arrested shall be retained in the police station or municipal court until the arresting officer makes a complaint and a warrant issues.

Any law enforcement officer may, instead of arresting an offender as herein provided, serve upon him a summons.

Amended 1940, c. 139; 1953, c. 36, s 26; 1983, c.403, s. 22;1983,c. 563; 1994, c. 184, s.4

PUBLIC LAW 1913, P. 742

34. Power of commissioner to summon witnesses, Process. Fees, etc.

Sec. 1. The Commissioner of Motor Vehicles shall have powers to **summon** witnesses to appear **before him** at his office, or at such other place as may be designated by the said commissioner, to give testimony in any hearing which the said commissioner may hold looking toward a revocation of any license issued by or under the authority of the said commissioner. **Such summons** shall be served at least five days before the return date. Service may be made by registered mail or by personal service. Whenever, it shall appear that any person has failed to obey **such summons**, he shall be subject to a penalty not exceeding one hundred dollars, to be recovered with costs in an action of debt, to be prosecuted by the Attorney-General of the State. The fees for witnesses required to attend before the commissioner shall be one dollar for each day's attendance and three cents for every mile of travel by the nearest generally traveled route in going to and from place where attendance of the witness is required; such fees to be paid when the witness is excused from

further attendance, and the disbursements made from payment of such fees to be audited and paid in the same manner provided for expenses of the Department of Motor Vehicles. (P.L. 1913, p. 742)

ADMINISTRATIVE PROCEDURE ACT

P.L. 1968, c. 410

TITLE 52

STATE GOVERNMENT, DEPARTMENTS AND OFFICERS

52:14B-2. Definitions

2. As used in this Act:

(e) "Administrative rule" or "rule", when not otherwise modified, means each agency statement of general applicability and continuing effect that implements or interprets law or policy, or described the organization, procedure or practice requirements of an agency. The term includes the amendment or repeal of any rule, but does not include: (1) statements concerning the internal management or discipline of any agency; (2) intraagency and interagency statements; (3) agency decisions and findings in contested cases.

52:14B-4. Adoption, amendment, repeal of rules

4. (a) Prior to the adoption, amendment, or repeal of any rule, except as may be otherwise provided, the agency shall:

(1) Give at least 30 days' notice of its intended action. The notice includes a statement of either the terms or substance of the intended action or description of the subjects and issues involved, and the time when, the place where, and the manner in which interested persons may present their views thereon. The notice shall be mailed to all persons who have made timely requests of the agency for advance of its rule-making proceedings and in addition to other public notice required by law shall be published in the New Jersey Register and shall be filed with the President of the Senate and the Speaker of the General Assembly. The notice shall be additionally publicized in such manner

as the agency deems most appropriate in order to inform those persons most likely to be affected by or interested in the intended action. Methods that may be employed include publication of the notice in newspapers of general circulation, distribution of press releases to the news media and posting of notices in appropriate locations.

(3) Afford all interested persons reasonable opportunity to submit data, views, or arguments, orally or in writing. The agency shall conduct a public hearing on the proposed rule at the request of a committee of the Legislature, or a governmental agency or subdivision, provided such request is made to the agency within 45 days following publication of the proposed rule in the Register. The agency shall provide at least 15 days' notice of such hearing, which shall be conducted in accordance with the provisions of subsection (g) of this section

(d) No rule hereafter adopted is valid unless adopted in substantial compliance with this act. A proceeding to contest any rule on the ground of noncompliance with the procedural requirements of this act shall be commenced within one year from the effective date of the rule.

L. 1968, c. 410, s. 4; amended 1981, c.27, s.11; 1986, c. 169, s.7; L. 1995, c. 166, s. 4; eff. July 5, 1995.

52:14B-4.1. Rules, submission to Legislature; referral to committee.

(1) Every rule hereafter proposed by a State agency shall be submitted by the Office of Administrative Law to the Senate and the Speaker of the General Assembly who shall immediately refer the proposed rule to the appropriate committee in each house.

52:14B-4.3 Disapproval or delay of effective date within 60 days of submission; concurrent resolution

A rule shall be deemed approved unless within 60 days of the submission thereof, the Senate and General

Assembly adopt a concurrent resolution disapproving the rule, in whole or in part, or providing that the rule not take effect during the 60 days following the date of the adoption of the resolution, during which time they may nevertheless adopt a concurrent resolution disapproving the rule. No action may be taken by the Legislature under this section until after 1 calendar day from the date of the standing reference committee's report.
L. 181, c. 27, s. 3.

52:14B-5. Filing of rules; concurrent resolution of the Legislature; effect of publication

(5) (a) Each agency shall file with the Director and Chief Administrative Law Judge of the Office of Administrative Law a certified copy of each rule adopted by it.

(b) No rule hereafter adopted shall be effective unless it has been deemed to be approved by the Legislature pursuant to section 3 of this amendatory and supplementary act.

(e) The publication of a rule in the New Jersey Administrative Code or the New Jersey Register shall be deemed to establish the rebuttable presumption that the rule was duly filed and that the text of the rule so published is the text of the rule adopted. Judicial notice shall be taken of the text of each rule published in the New Jersey Administrative Code or the New Jersey Register.
L. 1968, c. 410, s.5; amended 1978, c. 67, s. 7; 1981, c. 27, s. 12; 1993, c. 343, s.2.

DISMISSAL MOTION BRIEF

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
VICINAGE OF NEWARK

RUSSELL E. LERMAN Plaintiff	)Hon. W.G. Bassler,)U.S.D.J.
v.	)Civil Action No.)00-3475 (WGB)
ALBERT ARI, ACTING DIRECTOR, STATE OF NEW JERSEY, DIVISION OF MOTOR VEHICLES Defendant	)

BRIEF IN SUPPORT OF DEFENDANT'S
MOTION FOR DISMISSAL

JOHN J. FARMER, JR.
ATTORNEY GENERAL OF NEW JERSEY
Attorney for Defendant
R. J. Hughes Justice Complex
Division of Law/Transportation
P.O. Box 114
Trenton, New Jersey 08625
(609) 984-3877
By/s/ *Wanda Y Ortiz*
Wanda Y. Ortiz ()WY06457)
Deputy Attorney General

RETURN DATE: December 26, 2000
DATED: 11-27-00

(IRRELEVANT PORTIONS WERE OMITTED)

POINT II

In his complaint, plaintiff makes general allegations of constitutional violations by the State of New Jersey through the Division of Motor Vehicles. However, Plaintiff's assertion that N.J.S.A. 39:5-30(a) and the Automated Traffic System are unconstitutional is meritless. To the extent that he claims that the Director's authority under N.J.S.A. 39:5-30(a) to suspend or revoke driver's license violates his constitutional rights, presumably those of due process, his arguments fail.

Section V of Plaintiff's complaint sets forth his plea for equitable relief. This section provides in part:

> Plaintiff and members of the class have no plain, adequate or complete remedy at law, and have suffered and will continue to suffer irreparable harm unless defendant is enjoined from continuing illegal actions, practices and policies, maintained and conceived in bad faith, for his own personal convenience, whereby denying plaintiff, and members of the class their constitutional rights above enumerated. (Complaint at 6.)

Thus, Plaintiff prays for the Court to permanently enjoin the Director of the Division of Motor Vehicles from suspending or revoking driver's licenses.

It is well settled that the State may regulate the use of motor vehicles within the state and impose fees therefor. Kane v. New Jersey, 242 U.S. 160, 37 S.Ct. 30, 61 L.Ed. 222 (1916); State v. Unwin, 75 N.J.L. 500 (Err. & App. 1907). Motor vehicle license suspension and revocations are primarily designed to pritect the traveling public by removing offenders from the roads. Cresse v. Parsekian, 43 N.J. 326, 328, 204 A.2d 348 (1964). The State Legislature has vested the Division of Motor Vehicles with wide statutory powers and the Director's discretion respecting suspensions and

revocations of licenses should not be interfered with unless that discretion has been abused. Id. at 329. A court should grant more than mere deference or weight to the interpretation of a statute by the agency charged with its enforcement. Batterton v. Francis, 432 U.S. 416, 426, 97 S.Ct. 2399, 2406, 53 L.Ed.2d 448, 457 (1977); Mitchell v White Motor Credit Corp., 627 F.Supp. 1241, 1249 (M.D. TN 1986).

There is no evidence that the Director of the Division of Motor Vehicles has exceeded the statutory authority provided by the Legislature. Moreover, suspending and revoking licenses of drivers deemed dangerous protects the public and is a reasonable exercise of the discretion afforded by the Legislature. N.J.S.A. 39:5030(a) is a valid statute that does not impinge upon Plaintiff's constitutional rights. No relief may be granted to Plaintiff. Accordingly, Plaintiff fails to state a claim upon which relief may be granted and his Complaint should be dismissed.

DISTRICT COURT DISMISSAL OPINION

NOT FOR PUBLICATION

RECEIVED
William T. Walsh, Clerk
2001 APR -6 P 3:01
United States District Court

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

RUSSELL E. LERMAN, on behalf of Himself and all others similarly Situated Plaintiff, v. ALBERT ARI, ACTING DIRECTOR, STATE OF NEW JERSEY, DIVISION OF MOTOR VEHICLES, Defendant,	OPINION

APPEARANCES
Russell E. Lerman, Pro Se
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Attorneys for Defendant

BASSLER, DISTRICT JUDGE:

Defendant Albert Ari, Acting Director, State of New Jersey, Division of Motor Vehicles, ("Defendant") Moves to dismiss Plaintiff's 42 U.S.C. § 1983 putative class action suit pursuant to Fed.R.Civ.P. 12(b)(1) and 12(b)(6). Plaintiff moves to "strike" defendant's motion, to reinstate the entry of default against Defendant, and to enter default judgment or summary judgment against Defendant. For the following reasons, Defendant's motion to dismiss is granted. Plaintiff's motion to reinstate the entry of default and for default judgment is denied. Plaintiff's motion to "strike" Defendant's motion or for summary judgment is dismissed as moot.

I. BACKGROUND

A. FACTS

On October 29, 1995, Plaintiff was stopped and issued a ticket for a traffic violation. The date of the Summons was set for November 1, 1995. Plaintiff failed to appear in the Township of Randolph Municipal Court on that summons date. (Compl., at 3, ¶ 3.) A warrant for Plaintiff's arrest was issued on December 22, 1995. (Id at 3, ¶ 4.) According to Plaintiff, the warrant was not executed for 30 days and as a result, the Automated traffic System ("ATS") automatically "closed out the 'complaint.' " (Id. At 3, ¶ 5.)

The ATS allegedly then provides the Division of Motor Vehicles ("DMV") with a weekly electronic

transmittal of all "close-outs", which triggers a Scheduled Suspension Notice. (Id. At 3, ¶ 6). That Notice is sent to the defendant in the underlying municipal court action allowing the defendant 60 days to submit to the jurisdiction of the municipal court before the defendant's driver's license is suspended pursuant to N.J.S.A. 39:5-30(a). (Id.)

Plaintiff received a Scheduled Notice of Suspension indicating that his driver's license would be suspended on March 29, 1996 unless he answered his Summons. Although Plaintiff does not expressly so state, because he seeks, among other things, reinstatement of his driver's license, Plaintiff presumably did not answer his Summons and his driver's license was in fact then revoked.

Plaintiff, on behalf of himself and all others similarly situated, alleges that a driver's license is a constitutionally protected property and liberty interest that absent probable cause is protected from seizure by the Fourth Amendment and the due process clause of the Fourteenth Amendment. (Id. at 5, ¶ 10.) He contends that the ATS and the DMV "close-out" procedures are also unconstitutional. Moreover, Plaintiff maintains that N.J.S.A. 39:5-30(a), which authorizes the Director of the Division of Motor Vehicles to suspend or revoke driver's licenses and registration certificates, is unconstitutionally vague.

Accordingly, Plaintiff seeks to permanently enjoin the enforcement of N.J.S.A. 39:5-30(a) and a judgment declaring that that statute and the application of the ATS are unconstitutional. Further, Plaintiff requests that his driver's license be reinstated.

B. PROCEDURAL HISTORY

The Complaint was filed on July 18, 2000. Default was entered against Defendant on September 26, 2000. By Opinion and Order filed on November 21, 2000, the court granted Defendant's motion to vacate entry of default and permitted Defendant to answer out of time.

Defendant now seeks to have Plaintiff's Complaint dismissed, contending that the suit is barred by the Eleventh Amendment and moreover, that Plaintiff has failed to state a claim upon which relief may be granted. In response, Plaintiff moves to "strike" Defendant's motion to dismiss, to have the entry of default reinstated, and to have default judgment or summary judgment entered against Defendant.

At the outset, the Court notes with great dismay that the briefing by the Deputy Attorney General ("DAG") on behalf of Defendant is woefully inadequate. Plaintiff, although he is pro se, articulated in his motion for summary judgment legal issues, which the DAG should have addressed. In responding to Plaintiff's motion, however, the DAG submitted only a very short letter. That letter does not address any of Plaintiff's legal arguments, but rather, consists solely of sweeping, unsupported, and even inaccurate statements such as "Plaintiff introduces nothing new before the Court which undermines defendant's motion to dismiss ." Such poor lawyering is unacceptable. For the sake of judicial efficiency, however, the Court will consider Defendant's motion to dismiss on the merits and only issue this reprimand. But in the future, the Court will not adjudicate motions where the briefs are substandard.

II. DISCUSSION

A. Reinstatement of Entry of Default

Because Plaintiff seeks reversal of this Court's Opinion and Order filed on November 21, 2000, vacating entry of default, plaintiff's motion is in essence a motion for reconsideration and will be construed as such. A motion for reconsideration under Local Civil Rule 7.1 (g) must be filed within 10 days of the entry of the order on the original motion and forth 'the matters or controlling decisions which counsel believes the Judge or Magistrate has overlooked." Here, Plaintiff's motion challenging the Court's November 21, 2000 Opinion and Order was filed on December 12, 2000,

more than 10 days after the entry of the Opinion and Order. Therefore, Plaintiff's motion is untimely.

Even if Plaintiff's motion had been timely filed, the Court would not grant reconsideration. A court may grant a motion for reconsideration based upon an intervening change in the law or new, previously unavailable evidence. Natural Resource Defense Council v. U.S. E.P.A. , 705 F.Supp. 689, 7023 (D.D.C. 1989)(citations omitted). A party seeking reconsideration under Local 7.1(g) must do more than disagree with the Court's decision. Mere "recapitualization of the cases and arguments considered by the Court before rendering its original decision fails to carry the moving party's burden." G-69 v. Degnan, 748 F. Supp. 274, 275 (D.N.J. 1990); See also Fontenot v. Mesa Petroleum Co., 791 F.2d 1207, 1219 (5th Cir. 1986); Youmans v. Simon, 791 F.2d 341, 349 (5th Cir. 1986).

Moreover, a motion for reconsideration is improper when it is used "to ask the Court to rethink what it has already thought through---rightly or wrongly." Oritani Sav. & Loan Ass'n v. Fidelity & Deposit Co., of Md., 744 F. Supp. 1311 (D.N.J. 1990) (citations omitted), rev'd on other grounds, 989 F.2d 635 F.2d 635 (3d Cir. 1993). Additionally, reconsideration motions may not be used to relitigate old matters or raise arguments or present evidence that could have been raised prior to entry of judgment. Polizzi Meats, Inc. v. Aetna Life & Casualty Co., 931 F.Supp. 328, 339-39 n. 2 (D.N.J. 1996); see also Resorts Intern v. great Bay Hotel and Casino, 830 F.Supp. 826, 831 (D.N.J. 1992)(noting that Local Rule 7.1(g) invites counsel to draw the court's attention to decisions that may have been overlooked by the court, not those overlooked by counsel). Finally, "only if the matters which were overlooked, if considered by the Court, might reasonably have resulted in a different conclusion will the court entertain such a motion" Polizzi Meats, Inc. 931 Supp. at 339.

Plaintiff has not presented any intervening change in the law or new, previously unavailable evidence. Additionally, Plaintiff has not shown that the Court has overlooked any matters. Therefore, Plaintiff's motion to reinstate the entry of default and for default judgment against defendant is denied.

B. Defendant's Motion to Dismiss

1. Eleventh Amendment Immunity

(The District Judge denied Defendant's Eleventh Amendment argument and it will not be reproduced here at this time)

2. Failure to State a Claim

i. Standard for A Motion to Dismiss

Federal Rule of Civil Procedure 12(b)(6) allows a party to move for a dismissal based upon the pleader's "failure to state a claim upon which relief can be granted." Since the long established federal policy of civil litigation is to decide cases on the proofs, district court generally disfavor Rule 12(b)(6) motions. Melo-Sonics Corp. v. Cropp, 342 F.2d 856 (3d Cir. 1965) Panek v. Boqucz, 718 F. Supp. 1228, 1229 (D.N. 1989).

In deciding a motion to dismiss for failure to state a claim, all allegations in the pleadings must be accepted as true and the benefit must be given the benefit of every favorable inference that can be drawn from these allegations. See Conly v. Gibson, 355 U.S. 41, 48 (1957); Wisniewski v. John-Manville Corp., 812 F.2d 81, 83 n. 1 (3d Cir. 1987); Markowitz, 906 F.2d at 103. "All the rules require is a short and plain statement of the claim that gives the defendant fair notice of the plaintiff's claim and the grounds upon which it rests." Conley, 355 U.S. at 47.

Rule 12(b)(6) does not countenance "dismissals based on a judge's disbelief of a complaint's factual allegations." Neitzke v. Williams, 490 U.S. 319, 326-27 (1989). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claim." Scheur v. Rhodes, 416 U.S. 232, 236 (1974).

Accepting the facts in the pleadings as true and giving them all reasonable inferences, a court must dismiss under Rule 12(b)(6) "[i]f as a matter of law 'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.' " Neitzke, 490 U.S. at 326-27.

ii. Analysis

a. 42 U.S.C. § 1983

Certain of Plaintiff's claims are grounded upon 42 U.S.C. § 1983, which authorizes a cause of against:

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory..... subjects, or causes to be subjected, any citizen of the United States.....to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws.....

42 U.S.C. § 1983. Section 1983 " ' is not itself a source of substantive rights, ' but merely provides 'a method for vindicating Federal rights already conferred.' " Graham v. Connor, 490 U.S. 386, 393-94 (1989).

In order to state a claim under § 1983, a plaintiff must show a violation of a right secured by the Constitution and laws of the United States and demonstrate that the conduct complained of was committed by a person acting under color of state law. West v. Atkins, 487 U.S. 42, 48-49 (1988); Flagg Bros. Inc. v. Brooks, 436 U.S. 149, 155 (1978); Shaw v. Strackhouse, 920 F.2d 1135, 1142 (3d Cir. 1990).

1. Fourteenth Amendment

While the complaint is not entirely clear, Plaintiff briefly mentions that he was denied due process when, in violation of New Jersey Court Rule 7:12-1, he was only given 3, rather than 5 days notice to appear. Due process requires that the notice be "reasonably calculated, under all the circumstances, to appraise interested parties of the pendency of the action and afford them an opportunity to present their objections."

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). Here, notwithstanding the 2 day difference, Plaintiff cannot dispute that he was given notice and an opportunity to be heard on November 1, 1995.

Further, N.J.S.A. 39:5-30(a) expressly provides not only the grounds for suspension or revocation of a driver's license, but also requires "due notice in writing of such proposed suspension, revocation, disqualification or prohibition and the ground thereof." Plaintiff received the Scheduled Suspension Notice and had another chance to be heard. He ignored that notice as well. Having twice failed to answer the Summons, Plaintiff cannot now complain that he was deprived of due process.

Next, Plaintiff contends that Defendant was required to have factual evidence before suspending Plaintiff's driver's license. In so arguing, Plaintiff relies on the language in N.J.S.A. 39:5-30(a) that provides that the director of the DMV "may also summon witnesses to appear before him.....to give testimony in a hearing which he holds looking toward a revocation of a license or registration certificate issued by or under his authority." While the statute authorizes the director to summon witnesses to appear or give testimony, it does not require the director to do so. Accordingly, Defendant did not violate Plaintiff's Fourteenth Amendment rights to due process when it suspended his driver's license and did so using the ATS and the DMV "close-out" procedures.

2. Fourth Amendment

Plaintiff claims that the suspension or revocation of his driver's license requires probable cause because it constitutes a "seizure" under the Fourth Amendment. The Court, however, knows of no authority that supports Plaintiff's novel position. Therefore, the Court concludes that Defendant was not required to establish probable cause before suspending or revoking Plaintiff's driver's license.

b. 28 U.S.C. § 2201, et seq.

N.J.S.A. 39:5-30(a) authorizes the Director of the Division of Motor Vehicles ("Director") to suspend or revoke driver's licenses and registration certificates for violating any of the provisions of Title 39 or "on any other reasonable grounds." Plaintiff seeks a declaratory judgment that the phrase "any reasonable ground", is unconstitutionally vague. As set forth in the Scheduled Suspension Notice, Plaintiff's license was to be suspended for failure to answer a summons. Plaintiff concludes that failure to answer a summons falls within the "catchall vague standard of guilt clause 'other reasonable grounds,' " (Br. In Support of Pl.'s Motion, at 14.) (emphasis omitted), and that that was the basis which Defendant suspended Plaintiff's license.

Plaintiff, however, fails to recognize that the statute expressly provides that

> [a] person who fails to obey the summons shall be subject to a penalty not exceeding $100.00, to be recovered with costs in an action at law, prosecuted by the Attorney General, and in addition the vehicle registration or driver's license, or both as the case may be, shall forthwith be revoked.

N.J.S.A. 39:5-30(a). In accordance with this statute, the Scheduled Suspension Notice alerted Plaintiff that once his license is suspended, he must pay a $50 restoration fee.

Because Plaintiff's license was suspended for "fail[ure] to obey the Summons rather than "on any other reasonable grounds." Plaintiff lacks standing to challenge the "on any other reasonable grounds" clause of N.J.S. A. 39:5-30(a). Plaintiff presents only a generalized grievance to that portion of the statute. In order to invoke the jurisdiction of a federal court, a plaintiff must have "a personal stake in the outcome" of an otherwise justiciable controversy. Warth v. Seldin, 422 U.S. 490, 498-99 (1975), U.S. Const. art III, § 2, cl. 2. "[A]t an irreducible minimum, Art III requires the

party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,'.....and the injury 'fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision..... '" Valley Forge Christian College v. American United for Separation of Church and State, 454 U.S. 464, 472 (1982) (citation omitted).

Here, plaintiff does not have standing because he has not demonstrated that he has suffered or imminently will suffer an injury that is traceable to the "on any other reasonable grounds," provision of N.J.S.A. 39:5-30(a). Moreover, even if this Court were to find that the challenged phrase to be unconstitutional, Plaintiff's injury would not be redressed because as discussed above, the suspension of Plaintiff's license for failure to obey the summons is specifically authorized by the statute as a basis for license suspension.

C. Plaintiff's Motion for Summary Judgment or to Strike Defendant's Motion to Dismiss

Plaintiff argues that Defendant's motion to dismiss should be stricken because it is frivolous. Alternatively, Plaintiff moves for summary judgment. In light of the Courts ruling on Defendant's motion to dismiss, however, Plaintiff's motion to strike or for summary judgment is denied.

III. CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss is granted. Plaintiff's motion to reinstate the entry of default and for default judgment is denied. Plaintiff's motion to "strike" Defendant's motion or for summary judgment is dismissed as moot.

An appropriate order follows.

/s/ William G. Bassler
WILLIAM G. BASSLER, U.S.D.J

Dated: April 6, 2001

OPINION AFFIRMING DISTRICT COURT DISMISSAL

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 01-2533

RUSSELL E LERMAN, on behalf
of himself and all others
similarly situated

v.

ALBERT ARI, ACTING DIRECTOR,
STATE OF NEW JERSEY,
DIVISION OF MOTOR VEHICLES

Russell E. Lerman

Appellant

On Appeal From the United States District Court
For the District of New Jersey
(D.C. Civ. No. 00-CV-03475)
District Judge: Honorable William G. Bassler

Submitted Under Third Circuit LAW 34.1(a)
February 1, 2002
Before: NYGAARD, MCKEE and ALDISERT,
Circuit Judges

(Filed March 13, 2002)

OPINION

PER CURIAM

Russell E. Lerman appeals from the District Court order dismissing his complaint for failure to state a claim which relief may be granted. Lerman also challenges the District Court order denying his motion to vacate the dismissal order and his motion to have the Court recuse itself. We will affirm.[1]

Lerman was issued a ticket in New Jersey for failure to stop at a sign. The summons issued noted a court date of November 1, 1995. Lerman did not appear in court or pay the fine. A warrant for his arrest was issued December 22, 1995. Lerman received a "Scheduled Suspension" notice prepared by the New Jersey Division of Motor Vehicles, dated January 30, 1996, informing him that his driving privileges were scheduled to be suspended on March 29, 1996, and notifying him that he could contact the municipal court clerk to satisfy the summons. Lerman did not appear in municipal court, and his license was suspended. Lerman alleges that New Jersey procedures by which his license was suspended are unconstitutional. He alleges that he was given insufficient notice, and that a pre-suspension hearing was required. Lerman also alleges that a portion of N.J.S. 39:5-30(a) that allows suspension of a driver license on "any other reasonable grounds" is unconstitutionally vague.

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1. To the extent Lerman is challenging the District Court's order granting the defendant's motion to vacate the default judgment entered in this case, we find that the District Court did not abuse its discretion in vacating the default judgment, See Zawadadski DeBueno v. Bueno Castro, 822 F.2d 416, 420 (3d Cir. 1987)(court weighing equities on motion for default judgment does not use rigid formula, and default judgments are not favored in close cases.

once by the initial summons, and once by the Scheduled Suspension Notice. Having ignored the two notices, as the Court noted, "Plaintiff cannot now complain that he was deprived of due process." Dist.Ct.Op., April 9, 2001, at 11. The Court properly found that Lerman did not have standing to challenge the "any other reasonable grounds" clause, as his privileges were suspended for the statutorily provided grounds of failure to respond to a summons. See N.J.S.A. 39:5-30(a).

Lerman's allegations that the District Court had aligned itself with the appellee is without basis. On the contrary, the District Court issued a reprimand to the appellee at one point. Dist.Ct.Op., April 9, 2001, at 5. There is nothing in the District Court opinions that shows a bias against Lerman; Lerman cites only disagreements with an interpretation of the facts and law as they apply to his case. That is cause for appeal, not for disqualification of a judge.

For the foregoing reasons, and the reasons stated by the District Court, we will affirm.

ORDER DENYING PETITION FOR REHEARING

THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-2533

RUSSELL E. LERMAN, on behalf of himself and all others similarly situated

v.

ALBERT ARI, ACTING DIRECTOR, STATE OF NEW JERSEY, DIVISION OF MOTOR VEHICLES

Russell E. Lerman
Appellant

On Appeal from the United States District Court

For the District of New jersey
(D.C. Civ. No. 00-cv-03475]

SUR PETITION FOR REHEARING

BEFORE: BECKER, Chief Judge,
SLOVITER, SCIRICA, NYGAARD, ALITO, ROTH,
MCKEE, RENDELL, BARRY, AMBRO, FUENTES, and
ALDISERT,[1] Circuit Judges

The Petition for rehearing filed the Appellant in the above-entitled matter, having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court en banc, the Petition for Rehearing is hereby DENIED

It is so ordered.

By the Court,

United States Circuit Judge

DATE: 09 APR 2002

1. Judge Aldisert's vote is limited to panel rehearing only.